

ANSWERS

F O R

Alexander and Richard Spences, shoemakers
in Linlithgow, and Janet Spence, spouse
to James Richardson, farmer at Bellyea-
man;

T O T H E

PETITION of poor Jacobina Macfarlane, spouse to Andrew Currie, weaver in Portsburgh.

THE petition now to be answered, seems, in the humble apprehension of the respondents, to contain a great deal of argument, which cannot, properly speaking, come under the consideration of your Lordships, in this state of the process, never having been properly argued before the Lord ordinary, nor received his Lordship's judgment; his interlocutor, being in the following words: " Finds, that the whole sum charged for, is exhausted by Mrs. Macfarlane's claims upon her contract of marriage, which cannot be understood to be discharged by her husband's disposition in her favours, even though she had accepted of that disposition, of which there is no evidence; therefore suspends the letters *simpliciter*, and decerns."

20 The single question that is before your Lordships, is, whether this interlocutor is well founded or not; in other words, whether the claims of Mrs. Macfarlane, in virtue of her contract of marriage, are sufficient to exhaust the effects which appear to have been left by her husband.

A ... **The**

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The Commissaries, in consequence of what the respondents apprehend to be a most irregular procedure, and guess-work sort of evidence, but which the nature of the proceedings before the Lord ordinary, have never yet led them thoroughly to discuss, though the question concerning the irregularity is still open, have ascertained the effects left by Mr. Macfarlane, to have amounted to 77 l. 13 s. and have decreed for that sum in favour of the petitioner.

From the contract of marriage, the material clauses of which are fairly enough stated in the beginning of the petition, it appears unquestionably, that Mrs. Macfarlane was, in virtue thereof, intitled to the following provisions :

1mo, The liferent of 300 l. sterling, and the whole conquest during the marriage.

2do, To repayment of 400 merks instantly paid down, in case there was no children of the marriage existing at Mr. Macfarlane's death. And,

3tio, To repayment of 300 merks more, payable to Mr. Macfarlane, the first term of Whitsunday or Martinmas, after the death of Archibald Spence, Mrs. Macfarlane's father, and his wife, Elizabeth Johnston.

Mrs. Macfarlane's claim upon the first of these, amounts to 48 l. 6 s. 6 d. as she survived her husband three years, two months, and twenty days.

Her claim on the second, amounts to 22 l. 4 s. 5 $\frac{1}{2}$ d. so that these two, together, amounted to the sum of 70 l. 10 s. 11 $\frac{1}{2}$ d. being short of the sum in the decret suspended, only about 7 l. 2 s.

The petitioners object to the giving credit for the 300 merks which were to be paid to Mr. Macfarlane, after the death of Archibald Spence and Elizabeth Johnston, because they say, that the latter of these, died only a few years ago, and, consequently, the money never was paid. Upon enquiry, it appears, that Elizabeth Johnston did survive Archibald Macfarlane, and, therefore, the respondents do believe, that this 300 merks never was paid, of consequence, it cannot properly be charged to the credit of the respondents, though, by mistake, it was, together with the 400 merks, taken credit for in the proceedings before the Lord ordinary. And, now that the mistake is taken notice of, the respondents do most readily correct it.

But,

But, even though Mrs. Macfarlane's claims on her marriage-contract, should fall short, to the extent of 7 l. 2 s. in exhausting the sum decerned for ; the expence of the confirmation, rousing, &c. which the petitioners themselves allow, ought to be given credit for to the respondents, will do more than amount to that sum. Hence they can have no claim, however the matter may stand.

The petitioners contend, that the respondents are barred from pleading on Mrs. Macfarlane's contract of marriage, by a disposition executed by Mr. Macfarlane, of date 9th October 1751. This disposition makes over his whole estate to his wife and children, and, failing them, to Jacobina Macfarlane, the petitioner. This, they alledge, Mrs. Macfarlane accepted of, and by this they contend her claims on the contract of marriage, were extinguished.

Supposing the fact to stand thus, that Mrs. Macfarlane had actually accepted of this disposition, and acted under it, it does not occur, that this could, in any shape, extinguish her claims on the contract of marriage. By that contract, Archibald Macfarlane was a debtor, and his wife a creditor, in the event that happened, of her surviving him without children of the marriage. His leaving her executrix to him, and conveying his whole estate to her, could not surely take away her claims as a creditor; supposing a man should owe money on bond, and should name his creditor his executor, that could not annihilate the bonded debt; the creditor might take up the office of executor, and if the moveable funds proved insufficient for his payment, his having acted in the character of executor, would not prevent him from making his payment effectual afterwards, against the heir of his debtor. The Lord ordinary, therefore, hath justly found, that Mrs. Macfarlane's claims upon her contract of marriage, cannot be understood to be discharged by her husband's disposition in her favours, even though she had accepted of that disposition.

But, in the second place, the interlocutor of the Lord ordinary most properly sets forth, that there is no evidence of her accepting of this disposition, and, indeed, the petitioners are not able to condescend upon any act of hers, that can bear the interpretation of an acceptance. A general intromission with her husband's effects, is all they have to plead on, but such intromission may more naturally be ascribed to her claims, in consequence of her contract, than

than to the disposition ; since, had she intromitted under the disposition, it is hardly to be doubted, but that she would have expedited a regular confirmation, and made up inventories in terms thereof; and her not doing so, seems plainly to indicate, that her intromission was not in consequence of that deed.

If, therefore, Mrs. Macfarlane never accepted of this deed, how could it evacuate the claims in the contract of marriage? Archibald Macfarlane could not, by any deed of his own, executed *contra fidem tabularum*, annihilate the obligations and prestations he stood bound in by that contract, no more than a debtor, by bond, or any other legal document, can discharge himself, without the consent and intervention of his creditor. If, instead, therefore, of making his wife his executrix, he had made the petitioner, Jacobina Macfarlane, his executrix directly, still the claims in the contract of marriage would have been preferable to her right.

The respondents apprehend they have said enough in defence of the Lord ordinary's interlocutor, and have shown that it is well founded, and here they might, in strict propriety, rest their cause; but, as the petitioners have introduced a great deal of argument into the petition, concerning the general disposition, executed by Archibald Macfarlane, though the effect of that disposition was never properly debated before the Lord ordinary, the respondents will be pardoned for making a few observations concerning the effect of it, supposing there had been no contract of marriage in the case, and that it had been the only title of Mrs. Macfarlane's possession.

The material clauses of this disposition are recited in page third of the petition ; it appoints Elizabeth Spence, and the children, one or more, procreated or to be procreated between her and Mr. Macfarlane, and, failing these, Jacobina Macfarlane, Mr. Macfarlane's sole executors and universal legators. The petitioners contend, that this substitution of Jacobina Macfarlane must be considered to be effectual, whether the institute took under this deed or not, in so much, that, upon the death of the institute, the substitute must have access to the effects left, or their value, excluding the legal representatives of the institute from any concern in the deed.

The respondents do however humbly apprehend, that this interpretation is by no means suitable to the general spirit and intention

tendment of the deed. Elizabeth Spence is in that deed put upon the same footing with the testator's children; nay, she is vested with an ample power of applying the effects to her own behoof, and the behoof of the children, in such proportions as she should think fit; her right, therefore, cannot be considered in any other point of view, than that in which the right of the children must be considered likewise; now it cannot be supposed, that Mr. Macfarlane meant a substitution of Jacobina Macfarlane to his own children, in case they had actually succeeded him, and left issue. He surely meant, in that case, that his effects should descend to his grand-children, and not be carried off to their prejudice by the present petitioner.

Now, if this would have been the case, with respect to the children of Mr. Macfarlane, the respondents apprehend no distinction can be made, with respect to the case of his widow, who was in all respects upon the same footing with his children by the deed. If she had had children of another marriage, the effects conveyed must have descended to them, in the same way as they would have descended to the grandchildren of Archibald Macfarlane, in case of his having had children; and, if the effects would have descended to Mr. Macfarlane's children, the respondents cannot, with submission, see, why they ought not, in like manner, to have descended to them, her legal representatives: for, it does not occur, that any distinction can be made between the succession of children, and any other species of legal representatives, under this deed.

Further, not only the spirit and intendment of the deed seems to favour this interpretation, but the very words of it are such, as, in the apprehension of the respondents, will bear no other interpretation, than that of the full property being vested in Elizabeth Spence, subject to no controul whatever. The deed gives
 " power to the said Elizabeth Spence, she being on life at the time
 " of my decease, to confirm my testament, and give up inventory,
 " intromit with, uplift, and discharge, and to use and dispose of all
 " my means and effects, and to apply the same for her own use
 " and behoof, and for the use and behoof of our said children,
 " by such proportions as she shall think fit, she, the said Elizabeth
 " Spence, always having the sole administration of the whole,
 " during her widowity, and the nonage of her children; and,
 " failing of them, to her own use and behoof alienably, hereby
 " secluding, and debarring all others from the said office of ex-
 " cutor,

"cutor, and from all other interest, right or title in my said means or estate." The respondents must own, they can put no other sense upon those words, than that of their being intended, to vest a full and absolute property in Elizabeth Spence, which might intitle her to dispose of the effects at pleasure, in case there were no children; and which, even in the case of children, would intitle her to a share of them; and which property would descend by succession to her legal representatives.

But enough has been said concerning the matter, which, as before observed, is not regularly under the consideration of your Lordships. The respondents will now proceed to the consideration of some of the articles of their condescendence, which, though not taken notice of in the Lord ordinary's interlocutor, nor decided on by his Lordship, the petitioners have nevertheless thought proper to bring into this petition.

The first of these is 20 l. as aliment due to Elizabeth Spence from the death of her husband in August 1761, till Martinmas thereafter, when the first term's annuity became current. This, the respondents apprehend, was unquestionably a preferable debt upon the executry of Mr. Macfarlane. The law presuming that the family of a defunct are to keep together after his death, servants are intitled to their wages till that period, and the whole family to their maintenance; house-rent too, if due, must be paid; and as the whole of these are claims of an alimentary nature, the law hath humanely, and with great propriety, made them preferable on the whole head of the executry, and allows them always to an extent proportionable to the rank and station of the defunct. Mr. Macfarlane was a ship-master; and the sum there charged will not appear to be at all exorbitant for the family of a man in that station of life, nor is there the least foundation for saying, that this claim was, or could be, extinguished by Mrs. Macfarlane's acceptance of the disposition, it being clearly a debt against the executry of Mr. Macfarlane, available against her as his executor.

Another claim the petitioners object to is 28 l. 10 s. 7 d. as paid to creditors of Mr. and Mrs. Macfarlane, upon a decret of cognition. This the petitioners object to, because they alledge they were debts of Mrs. Macfarlane's. This does by no means appear to be the case, with respect to all of them. But the respondents shall suppose that it really was so. They humbly apprehend there is no relevancy in the objection. Mr. Macfarlane's effects were conveyed

ed to Mrs. Macfarlane, to be applied to her behoof, as the deed expressly bears, of consequence she could dispose of them for all her necessary uses, and her debts must affect them, unless the deed had, in express terms, borne, that she was to have nothing else but a life-right; of consequence, therefore, the respondents are intitled to bring this sum to their credit, even though the debts had all of them been debts of Mr. Macfarlane's only.

The petitioners put the general article for the sick-bed and funeral charges of Mrs. Macfarlane on the same footing with the last; and the respondents do apprehend, that what they have said with respect to the article of debts, will apply likewise to these expences. They are, no doubt, a debt of Mrs. Macfarlane only; but as, by the nature of the disposition, the effects conveyed were to be applied for her behoof, so this debt of hers falls to be satisfied out of them likewise.

With respect to the article of the charge of confirmation, the petitioners do not seem to object to that, and therefore little need be said concerning it. The petitioners, however, seem to have some idea about proportioning this expence between the parties, which the respondents, with submission, can see no good ground for; for, if the claim of the petitioners is founded at all, the respondents are drawing as creditors, and the petitioners as executors. The respondents, therefore, are intitled to draw, free of any expence, of consequence, the expence of confirmation must land on the free executry-funds. But when all the circumstances of the case are considered, it is apprehended, it must appear there will be no funds remaining to dispute about.

Upon the whole, the respondents apprehend, that the interlocutor of the Lord Ordinary is well founded, and even though a balance should remain, after satisfying the claims of the contract of marriage, that must go in extinction of other claims belonging to the respondents. The petitioners are pleased to plead poverty, and that they could not carry on this cause without the benefit of the poor's roll. The respondents, with respect to prosecutions before courts of law, into which they have been brought by the petitioners, are here on an equal footing with them, and the petitioners have really an advantage over them, by having first obtained the benefit of the poor's roll, which they were equally well intitled to.

In respect whereof, &c.

ANDREW CROSBIE.